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In The
Supreme Court of the United States

October Term, 1997

VINCENT EDWARDS, KARL V. FORT,
REYNOLDS A. WINTERSMITH,
HORACE JOINER & JOSEPH TIDWELL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. PETITIONERS' CLAIM WOULD AFFECT THEIR SENTENCES

The government argues in its brief that the trial court would necessarily have to sentence Petitioners to precisely the same sentences even if Petitioners had only been convicted of a cocaine conspiracy. Brief of the United States at 8-9, 15, 18, 20, 33-34. It, therefore, urges this Court to affirm the convictions on the ground that the principle Petitioners seek to apply would not help any of them. The government is wrong both on statutory and United States Sentencing Guidelines Manual ("U.S.S.G." or "Guidelines") grounds.

A. Petitioners' Claim Would Affect Application Of The Statutory Maximum Penalty

The government initially asserts that the maximum statutory penalty that could be imposed on Petitioners is not affected in this case. Brief of the United States at 15. That assertion is only true, however, if this Court rejects Petitioners' argument on the merits. The government concedes that the conspiracy count of which Petitioners were convicted did not specify any threshold quantity of narcotics or cite to any subsection of 21 U.S.C. Section 841(b) ("Section 841"). Brief of the United States at 28. A narcotics distribution conspiracy of an unspecified quantity of either powder cocaine or cocaine base carries a maximum penalty of twenty years. 21 U.S.C. § 841(b)(1)(C). Thus, if Petitioners are correct that 21 U.S.C. Section 846 ("Section 846") requires a jury determination of the type and/or threshold quantity of the alleged controlled substance or that the Fifth Amendment Due Process clause requires notice of the maximum potential penalty before the onset of jeopardy, then this case implicates statutory maximum penalties. For example, Petitioners Fort and Wintersmith received life sentences and Petitioner Tidwell received a sentence of 252 months, all in excess of the twenty-year maximum permissible under the indictment. (J.A. 51, 89, 143).

Moreover, even if one focuses just on the type of drug, a statutory maximum issue remains that requires reversal or remand. In determining the statutory maximum, the sentencing court may only use the drug or drugs in the offense of conviction. After that determination, the sentencing court applies the Guidelines. As part of the Guidelines calculation, relevant conduct principles allow the inclusion of additional drugs or transactions. The court may not impose a sentence above the statutory maximum for the offense of conviction, regardless of the type or quantity of relevant conduct drugs. Here, the trial court incorrectly assumed that the verdict included both drugs; then it combined the quantities of both drugs to reach a maximum statutory penalty of life.¹ However, there was never a determination of the applicable statutory maximum under Section 841(b) if the offense of conviction only embraced powder cocaine.

The government's brief obscures this issue by inappropriately mixing statutory maximum apples with Guidelines oranges. The government contends that the amount of powder cocaine the court assigned to each Petitioner was sufficient to justify the statutory maximums they received. These powder cocaine amounts were arrived at, however, as part of the court's Guidelines calculation, not as part of the distinct statutory maximum calculation for the offense of conviction. In other words, the government asks this Court to *assume* that the trial court's Guidelines determination on the amount of powder cocaine it believed was related to the dual object conspiracy would necessarily have been the same as the

¹ Actually, the court made two errors that compounded the problem in this case. The first task for the court was to determine the statutory maximum for the offense of conviction. The second step was to complete the Guidelines inquiry, including relevant conduct. The court proceeded directly to the Guidelines inquiry, added up all the drugs (including relevant conduct), and concluded that the statutory maximum for the conspiracy was life. Thus, on this record, the court made no separate findings of the statutory maximum. (*E.g.*, J.A. 107).

amount of powder cocaine involved in the offense of conviction even if that conviction were understood to be a conspiracy to distribute only powder cocaine. While these statutory and Guidelines calculations for conspiracy cases are similar, they cannot be assumed to be identical. In the absence of particularized findings, therefore, the sentences may not stand.²

As an initial matter, the Guidelines *require* aggregation of drug amounts and types arising from various acts of distribution which are related in fixing the drug amount. U.S.S.G. § 2D1.1. The statutory maximum penalties, however, speak only of individual violations ("a violation . . . involving" a particular quantity of a specified controlled substance). 21 U.S.C. § 841(b)(1)(A). Moreover, Section 841(b) has no provision that permits the court to aggregate multiple types of drugs to determine the applicable statutory sentence. The statutory maximum applicable in a multiple drug case thus is not answerable by reference to the methodology applied under the Guidelines.

Furthermore, comparing the trial court's actual findings under the Guidelines for just two of the Petitioners reveals the very real possibility that different statutory maximums may have resulted if the trial court began the process with the understanding that the verdict was based only upon a powder cocaine conspiracy. After all, the sentencing court determined that Petitioner Fort was responsible for 24,000 grams of cocaine, half of which the court ruled was cocaine base, while concluding Petitioner Edwards was only responsible for 21 grams of cocaine, 14 of which the court ruled was cocaine base, even though both Petitioners were convicted of the identical charge of conspiracy, and even though the court's findings rested on a view that the conspiracy embraced both

² Thus, the vast differential in available punishment between cocaine and cocaine base (100 to 1) in itself provides a sufficient disparity to question whether the sentencing judge's determination regarding drug amounts setting forth the maximum penalty would have been different if he had looked at the conspiracy differently. Compare 21 U.S.C. § 841(b)(1)(A)(ii) and (iii).

objectives. If that kind of disparity can exist in examining the entire course of conduct that all the conspirators engaged in, could reasonably foresee, and arose out of a common scheme or plan or course of conduct, then surely the court's fact-finding done in the more narrowly circumscribed set of rules governing statutory attributable drug amounts might also be widely disparate.³ No one knows what the sentencing court would have concluded regarding the statutory penalties if it were required to consider the offense of conviction as merely embracing a powder cocaine conspiracy; the sentencing court made no such findings at all regarding the statutory penalty and the government's assertion regarding what the court would have done is nothing more than dubious speculation.

B. Petitioners' Claim Would Affect Application Of The Sentencing Guidelines

In addition to the difficulties with the statutory penalty analysis, application of the Guidelines themselves show the government is wrong in asserting that the sentencing court would be obligated to reach the same sentence even if the object of the charged conspiracy was only distribution of powder cocaine. The government's approach improperly eliminates the distinction between offense of conviction and relevant conduct under the Guidelines.

The first step in any Guidelines analysis, prior to the determination of relevant conduct, is to find the guideline that

³ Assume, hypothetically, that defendant A is involved in only a powder cocaine conspiracy to distribute 1 kilogram of powder cocaine. The maximum sentence for this defendant would be forty years, even if the court found at sentencing that there were 4 more kilograms of relevant conduct powder cocaine. Five kilograms of powder cocaine under the statute would ordinarily trigger a life sentence but relevant conduct cannot increase the statutory maximum which remains at forty years. In this case, powder cocaine was attributed to each Petitioner by the court in its Guidelines calculations because it was related to the distribution of the cocaine base objective. (E.g., J.A. 110-112). Without specific findings, there is too great a danger that Petitioners' maximums exceed the statutory limits for their offenses of conviction.

is "most applicable," not to the real conduct of the defendants as the government would suggest, but to the charged conduct which formed "the offense of conviction (*i.e.*, the offense conduct *charged in the count of the indictment or information of which the defendant was convicted*)." U.S.S.G. § 1B1.2(a) (emphasis added); *see also* U.S.S.G. Chapter 1, Part A, 4(a). Once the appropriate guideline is established, the sentencing court then goes on to address relevant conduct, *i.e.*, other criminal conduct that arose out of "the same course of conduct" or "common scheme or plan as the offense of conviction." U.S.S.G. §§ 1B1.2(b) and 1B1.3(a)(2). In making this determination, the offense of conviction continues to be the relevant reference point from which the relevant conduct can be assessed and the base offense level determined.

A conspiracy conviction embracing multiple objects is likely to include a broader scope of relevant conduct than would a conspiracy embracing just one objective. For example, a conspiracy that embraces an objective to rob a bank and launder money would likely reach out and include participants and financial transactions relating to the laundering of money, perhaps including offshore banks. A conspiracy embracing only a bank robbery, on the other hand, might be limited to just the proceeds of a particular bank robbery and the attendant harms caused by the robbery itself. Thus, the scope of relevant conduct under the Guidelines is narrowed by the scope of the original conspiratorial agreement (determined by reference to the offense of conviction). This analysis does not disappear when the two criminal objectives are distinct controlled substances. While conspiracies to distribute two separate drugs have conspiratorial objectives which are more similar in nature, under the Guidelines, the sentencing court's drug quantity findings must be guided by a proper consideration of the conspiratorial agreement, and that understanding produces often vastly different results. *Compare, e.g.*, U.S.S.G. § 1B1.3, Application Note 2, Commentary, Illustrations (c)(5), (c)(6), (c)(7) & (c)(8) ("[T]he scope of the jointly undertaken criminal activity . . . may depend upon whether, in the particular circumstances, the nature of the

offense is more appropriately viewed as one jointly undertaken criminal activity or as a number of separate criminal activities.”).

Moreover, the offense of conviction – as distinguished from relevant conduct – continues to have an impact on the Guideline range throughout the Guidelines determination of the adjusted offense level. For example, to receive a reduction for acceptance of responsibility, a defendant “is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction. . . .” U.S.S.G. § 3E1.1, Application Note 1(a). Whether the victim of a crime was vulnerable, requiring an upward adjustment, depends on the status of the victim of the offense of conviction and not on some other person who might have been victimized by relevant conduct. U.S.S.G. § 3A1.2, Application Note 1. The statutory penalty for the offense of conviction, in the case of a career offender, and not the relevant conduct guideline, sets the base offense level and determines whether a defendant serves ten years or twenty-five years of imprisonment. U.S.S.G. § 4B1.1. Therefore, a sentencing court must distinguish between the offense of conviction, relevant conduct that arises out of the offense of conviction, and any other criminal conduct that may be attributable to the defendant in connection with a different offense because those distinctions have profound implications on the ultimate sentencing guideline ranges imposed by the court.

Therefore, a proper application of the Guidelines requires more than a careful assessment of credibility and evidence. Here, the court failed to make three kinds of required findings. First, as discussed in Part I.A., *supra*, there is no record of what drug amounts of powder cocaine and cocaine base the court attributed to each Petitioner as part of the offense of conviction. In addition, however, the Guidelines calculations do not reflect whether any drugs (both type and quantity) for each Petitioner were included because they were relevant conduct or part of the offense of conviction. Moreover, if some amounts were included as relevant conduct, there are no findings as to which object of the conspiracy those drugs were assigned. Thus, the government cannot even assert that the

court necessarily would have reached the same Guidelines sentence for each Petitioner.

A few examples of how even the Guidelines sentences of Petitioners could have been affected are appropriate. First, the actual seizures of cocaine and cocaine base from some of the respective Petitioners were insignificant compared to the amounts ultimately attributed to them. For example, Petitioner Fort personally distributed not a single gram of powder cocaine or cocaine base during the entire conspiracy, and no drug purchases by undercover agents or drug seizures from his person or his residence ever occurred; yet testimony of cooperating codefendants and amounts seized from other persons resulted in a finding of 24,000 kilograms. (J.A. 73-75). Second, the testimony of the cooperating witnesses conflicted, sometimes directly, regarding the amounts of drugs sold by members of the conspiracy and by others during times of the conspiracy. (J.A. 78-81). Third, the district court discounted, sometimes by 90 and 100 percent, the testimony of these cooperating witnesses because of a lack of corroboration or reliability of their drug quantity estimates. (J.A. 73-75, 77-79). Against this factual backdrop, the district court made assessments in credibility of various witnesses and weighed that evidence against other evidence toward the goal of making reasonable drug quantity findings. This assessment would likely have been severely impacted by assessing the criminal activity first from the perspective of a powder cocaine conspiracy only.

The single largest seizure of cocaine base in this case provides an illustration of this difficulty. On May 28, 1993, law enforcement officers seized one kilogram of cocaine base supplied to Gloria Holmes by Islander Willis. Neither Holmes nor Willis were indicted or unindicted co-conspirators in this case (Holmes was indicted, but not charged with the conspiracy). (J.A. 4-10, 110). The cocaine was found in Holmes' home. Gloria Holmes was the girlfriend of Montie Russell, who was an indicted co-defendant. Based on recorded telephone conversations between Montie Russell and Sam Tidwell at the time of the seizure and the testimony of another witness, Donald Box, the district court concluded that the

kilogram of cocaine was part of the cocaine base being distributed by "this conspiracy." (J.A. 110). Thus, the court held Petitioner Wintersmith accountable for that kilogram of cocaine base based on a finding that (1) he was involved in a cocaine base conspiracy, (2) Russell was involved in the same conspiracy, (3) Russell stored cocaine in his girlfriend's house, and (4) the seizure of cocaine base at the house belonged to Russell and to the conspiracy. If the court, however, had examined this activity as being outside of the conspiracy, the court would more likely than not have concluded that this cocaine base transaction either was not relevant conduct or was beyond the scope of the agreement Petitioner Wintersmith had joined. These types of factual findings are best made by the district courts; this case must be remanded to permit the district court to make these assessments. *See Koon v. United States*, 518 U.S. 81, ___, 116 S. Ct. 2035, 2047 (1996) ("District courts have an institutional advantage over appellate courts in making . . . determinations [based on departures from the Guidelines].").

II. PETITIONERS' CONSTRUCTION OF THE STATUTE IS CORRECT, CONSISTENT, AND REASONABLE

Petitioners submit that the language of Section 846 mandates that the offense of conviction under this section must specify the identity of the drugs at issue. The government disagrees but fails to address or consider the actual language of Section 846 in its brief. The government also tries to show that Petitioners' construction of Section 846 would lead to various unpalatable consequences. In each case, the government is mistaken. In fact, it is the government's construction that leads to unacceptable consequences and cannot be squared with this Court's prior decisions.

A. The Government's Reliance On The Structure Of Section 841 To Construe Section 846 Is Erroneous

Petitioners focused the Court on the terms of Section 846, the provision under which Petitioners were convicted

and sentenced. Petitioners showed a Section 846 conspiracy must incorporate an "offense" for which the underlying statutory provision – in this case Section 841 – "prescribe[s]" a penalty. In the case of Section 841, the underlying provision prescribes a penalty only for a specified type of drug, not for drugs in general. *See* Opening Brief at 11-13. The government ignores the actual language of Section 846. It chooses instead to rely on the language of *Section 841*. Pointing out that Section 841 has separate sections entitled "Unlawful Acts" and "Penalties," the government argues that *Section 846*, therefore, defines a single offense for any agreement to violate Section 841, regardless of the type of drug or any other threshold facts that prescribe the penalties under Section 841(b). *See* Brief of the United States at 22-25. This argument is clearly mistaken for several reasons.

Even if the government's construction of Section 841 were correct, it would be beside the point here because Petitioners were convicted of a *conspiracy* under *Section 846*. The government's argument simply ignores the distinct terms of Section 846. In fact, Congress had good reason to structure Section 846 to require a specification of the offense sufficient to determine the relevant range of penalties for each conspiracy. Legislators, courts, and commentators have long recognized the dangers inherent in broad and ill-defined conspiracy charges. *See, e.g., Dennis v. United States*, 384 U.S. 855, 860 (1966) ("Indictments under the broad language of the general conspiracy statute must be scrutinized carefully as to each of the charged defendants because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable."). Requiring that the object of the conspiracy be charged and proved with sufficient specificity is consistent with this recognition. In a Section 841 case, the charge and trial evidence would be limited to time, place, and number of incidents at issue. In a Section 846 case, in contrast, the case typically will encompass a broad expanse of time and numerous potential incidents in different places involving different people and different overt acts from which the government asks the jury to deduce the existence and scope of the charged conspiracy. Given the nature of

conspiracy charges and the vast differences in penalties attached to different kinds of drugs, it is perfectly sensible for Congress to define the offense to incorporate the identity of the drugs in each case. Indeed, as Petitioners explained in their Opening Brief, this construction of Section 846 is consistent with the courts' construction of the general conspiracy statute, 18 U.S.C. Section 371. *See* Opening Brief at 14-15. Thus, even if the Court accepts the government's premise that a Section 841 sentencing requires *no* specification of the drugs at issue in the charge and jury verdict, that conclusion need not – and, given the terms of the conspiracy statute, does not – apply to Section 846.

Most importantly, however, the government's reliance on the labels of Section 841(a) and Section 841(b) to make its case is patently defective in any event. First, subsection (b) of Section 841, although entitled "Penalties," clearly does define distinct elements of Section 841 crimes which the jury must find in deciding guilt, not the judge alone in setting the sentence. As the government itself concedes, proof of a "detectable amount" of drugs is clearly a necessary element of the crime of possession with intent to distribute under Section 841.⁴ The term "detectable amount," however, appears *only* in Section 841(b), the subsection entitled "Penalties," *not* in Section 841(a). The government's concession that "detectable amount" – a requirement found only in the "Penalties" section of Section 841 – is an element of the offense directly defeats its central argument for construing Section 846 to require no jury determination of drug type.

Furthermore, the government fails to acknowledge that subsections (b)(5), (6), and (7) of Section 841(b) define distinct crimes (and therefore additional elements) by setting forth specific factual requirements which the jury must find before the court may impose the statutory penalties that each

⁴ *See* Brief of the United States (stating that "Section 841 itself does not require any jury determination of the type and quantity of drugs involved in a defendant's conduct (*other than a determination that it involved a detectable quantity of some controlled substance*)") (emphasis added); *see also* *United States v. McGeshick*, 41 F.3d 419 (9th Cir. 1994).

provides.⁵ These sections also appear in the part of Section 841 entitled "Penalties," yet they also clearly define elements of the offenses in question.

Second, this Court's decision in *Ratzlaf v. United States*, 510 U.S. 135 (1994), clearly dooms the argument the government relies upon here. In *Ratzlaf*, the Court addressed the anti-structuring provisions of the currency transactions reporting laws codified at 31 U.S.C. Section 5324.⁶ The enforcement provision, 31 U.S.C. Section 5322 ("Section 5322"), is entitled "Criminal penalties" and provides that "[a] person willfully violating this subchapter . . ." shall be subject to certain punishments. Applying the government's canon of construction, the fact that the willfulness requirement appeared in a section entitled "Criminal penalties" should have demonstrated that Congress intended willfulness merely to be a sentencing threshold for the trial court to determine, not an element of the offense for the jury to decide. In *Ratzlaf*, the Court held that the willfulness requirement of Section 5322 requires that the jury find beyond a reasonable doubt that the defendant acted with knowledge that his conduct was illegal.⁷ 510 U.S. at 139, 148. Thus, the fact that the identity of the drug appears in a provision entitled "Penalties" does not show Congress intended it be treated solely as a factor for the court at sentencing.

⁵ *See, e.g., United States v. Betz*, 82 F.3d 205, 205 (8th Cir. 1996) ("Defendant-appellant . . . was indicted . . . for knowingly manufacturing, culturing and harvesting marijuana plants on federal property in violation of 21 U.S.C. § 841(a)(1), § 841(b)(1)(B)(vii), and 841(b)(5).").

⁶ Congress subsequently amended the statute. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 411, 108 Stat. 2160, 2253.

⁷ The Seventh Circuit itself has followed the teaching of *Ratzlaf* in holding that the willfulness requirement for illegal dealing in firearms, which appears in a provision entitled "Penalties," also requires proof that the defendant violated a known legal duty as an element of the offense. *United States v. Obiechie*, 38 F.3d 309 (7th Cir. 1994).

B. The Government's Attacks On Petitioners' Construction Of Section 846 Are Incorrect

The government mistakenly attacks Petitioners' reading of Section 846 on the grounds that (a) it implies the *convictions* must be invalid, not just the sentences, and (b) it necessarily implies the indictment and verdict in Section 846 cases must include other facts that are necessary to prescribe a penalty under the various possible object offenses for a Section 846 conspiracy. These objections are incorrect.

Petitioners' argument does not necessarily imply that their convictions must be invalid because the jury verdict did not specify the drugs at issue. The ambiguity of the jury verdict does not render the convictions invalid because this Court has held that ambiguous, multiple-object conspiracy verdicts are permissible so long as each potential object of the charged conspiracy is legally valid standing alone. *Yates v. United States*, 354 U.S. 298 (1957). The circuit courts, whose approach Petitioners urge this Court to validate, have found that the ambiguity of the conspiracy verdict invalidates a sentence based on the most egregious of the multiple objects charged, but did not find the ambiguity necessarily invalidated the conviction.⁸ In fact, this Court has already recognized precisely this distinction. This Court's plurality decision in *Schad v. Arizona*, 501 U.S. 624 (1991), expressly drew a distinction between the general verdict's effect on the validity of conviction in that case and its effect on sentencing. In *Schad*, the Court approved jury instructions which allowed the jury to return a verdict of conviction for capital murder

⁸ See *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), *cert. denied sub nom. Joyce v. United States*, ___ U.S. ___, 116 S. Ct. 1556 (1996); *United States v. Orozco-Prada*, 732 F.2d 1076, 1083-84 (2d Cir.), *cert. denied*, 469 U.S. 845 (1984); *United States v. Quicksey*, 525 F.2d 337, 342 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976); *United States v. Bounds*, 985 F.2d 188, 193 (5th Cir.), *cert. denied*, 510 U.S. 845 (1993); *United States v. Owens*, 904 F.2d 411, 414 (8th Cir. 1990); *United States v. Garcia*, 37 F.3d 1359, 1369-70 (9th Cir. 1994), *cert. denied*, 514 U.S. 1067 (1995); *Brown v. United States*, 299 F.2d 438, 440 (D.C. Cir.), *cert. denied sub nom. Thornton v. United States*, 370 U.S. 946 (1962).

without specifying whether the jurors unanimously found the defendant guilty of premeditated murder or of felony murder. The plurality observed that, under state law in that case, the penalty for both premeditated and felony murder authorized the same maximum penalty – death. *Id.* at 644 n.9. “Moreover,” this Court reasoned, “the dissent’s concern that a general verdict does not provide a sentencing judge with sufficient information about the jury’s findings to provide a proper premise for the decision whether or not to impose the death penalty . . . goes only to the permissibility of a death sentence imposed in such circumstances, not to the issue currently before us, which is the permissibility of the conviction.” *Id.*

The government also argues that Petitioners’ argument suggests that the jury verdict in a Section 846 case must specify not only the identity of the drug at issue, but also other relevant statutory factors, before the trial court may sentence based on such factors. This objection, too, is misplaced.

First, the issue of whether the jury verdict must specify the threshold *quantity* of drugs under Section 841(b) is not itself before the Court in this case. Second, the government’s argument is, in reality, no objection at all to Petitioners’ construction. The government repeatedly exaggerates Petitioners’ argument in this regard. Petitioners do not claim, for example, that the Section 846 verdict must specify the exact amount of a drug in order for the court to impose a sentence. Rather, the logical consequence of our argument is only that the indictment would have to provide notice of *threshold* amounts necessary to identify the nature of the conspiracy with sufficient specificity to predict the range of penalties. Because the jury normally receives the counts of the indictment, no changes on how the jury returns its verdict would be required. Moreover, the government’s normal practice in many districts is to charge Section 846 conspiracies in exactly this manner, alleging either the identity and threshold quantity of the drug or by citing to a subsection of Section 841(b). There is nothing extraordinary or onerous in asking the government to charge and obtain a verdict on the essential,

threshold facts defining the Section 846 offense of conviction on which the court is to sentence.

Finally, however, the identity and the threshold quantity of drugs in a Section 846 conspiracy case can be easily distinguished. The context from which Section 846 and Section 841 arose confirms that Congress understood the identity of the drug to be an element of the offense on which the jury would return a verdict. Section 841 was enacted in 1970 to gather into one comprehensive provision the various distinct laws which Congress had enacted to address each kind of illegal drug. *See* Opening Brief at 18-19. Prior to 1970, the jury had to agree on the identity of the drug at issue in returning a conviction for the crimes that now are collected within Section 841. This history, and the fact that nothing in the legislative history or terms of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 ("1970 Act"), suggests that Congress intended to change the role of the jury in recodifying these regulations, confirm Petitioners' construction. The same cannot be said of drug quantity, however, because the various provisions prior to the 1970 Act did not contain differential maximum penalties depending on quantity. *See, e.g.*, Harrison Narcotic Drug Act, Ch. 1, 38 Stat. 785 (1914); Narcotic Drugs Import and Export Act of 1922, Ch. 202, 42 Stat. 596; Marijuana Tax Act of 1937, Ch. 553, 50 Stat. 551.⁹

⁹ The fact that Congress specifically separated consideration of prior convictions into a distinct section of the code, 21 U.S.C. § 851, and expressly dictated that the court would make findings as to prior convictions also *supports* Petitioners' view of drug identity as an element of the offense. Section 851 shows that, in the 1970 Act, Congress did consider whether to make a fact into a sentencing factor for the court alone and knew how to state its intention to do so. In contrast to prior convictions, Congress did *not* provide that drug identity would henceforth be treated only as a sentencing factor for the court.

C. The Government's Reading Of Section 846 Contradicts Established Principles And Authorities

As Petitioners have shown in their Opening Brief, it is the government's construction of Section 846 that leads to conflicts and inconsistencies with existing principles which this Court and the lower courts have established in other cases. In summary, these conflicts and inconsistencies include the following:

1. The government's position here contradicts not only the long-established holdings of all the circuit courts that have addressed this issue prior to the present case, but it also contradicts the Seventh Circuit's opinion in this case below. All circuit courts which have addressed the question, except the Seventh Circuit below, agree that an ambiguous Section 846 verdict cannot support sentencing at the highest statutory maximum penalty where the government charged different possible objects that would clearly carry different statutory maxima. *See, e.g.*, *United States v. Melvin*, 27 F.3d 710; *Orozco-Prada*, 732 F.2d at 1083-84; *Quicksey*, 525 F.2d at 342. Moreover, even the Seventh Circuit's opinion below agrees with the rule set forth in cases like *Brown v. United States*, 299 F.2d 438, and concedes that an ambiguous general verdict cannot support the highest maximum where the conspiracy charges as its objects two different statutory sections of the criminal code carrying different sentencing ranges. *United States v. Edwards*, 105 F.3d 1179, 1181 (7th Cir. 1997).

The government, however, concedes *neither* of these propositions, rejecting alike the holdings in cases such as *Brown* and the holdings in cases such as *Orozco-Prada*. Brief of the United States at 32. The government may recognize, as Petitioners contend, that the rules in cases such as *Brown* and cases such as *Orozco-Prada* rest on the same principles; that there is no persuasive way to accept *Brown* and reject *Orozco-Prada*; and that those same principles apply with equal force here as they do in cases such as *Brown* and *Orozco-Prada*, regardless of whether the identity of the drugs here would change the statutory maximum for any of the Petitioners. In

all these cases, the court does not have the statutory authority to sentence without an unambiguous jury verdict specifying the object of the conspiracy of which it found the defendants guilty. The government's position, therefore, cannot rationally be squared with the long-accepted principles first stated in *Brown* and carried forward in numerous circuit court decisions since that time.

2. The government's construction of Section 846 conflicts with the accepted construction of the general conspiracy statute, 18 U.S.C. Section 371 ("Section 371"), which uses the same language to define the object offense in a conspiracy. *See* Opening Brief at 14-15. For sentencing purposes, Section 371 distinguishes between conspiracies to commit felonies and conspiracies to commit misdemeanors, just as Section 846 distinguishes among different kinds and amounts of drugs. If the government obtained a general jury verdict on a charge of conspiring to commit either a felony or a misdemeanor, the court may not determine that the object was a felony in sentencing the defendant, but must instead assume that the offense of conviction was a conspiracy to commit a misdemeanor. *See, e.g., United States v. Scanzello*, 832 F.2d 18, 23 (3d Cir. 1987). The government chose not to address this point in its brief. Petitioners submit that the government's position here is inconsistent with cases like *Scanzello* and would necessarily lead to the conclusion that the trial court, not the jury, could make the crucial determination as to the nature of such a Section 371 conspiracy in the sentencing process.

3. The government's construction of Section 846 also conflicts with the position it has successfully advanced in double jeopardy cases, holding that a defendant may be found guilty of multiple offenses under Section 841(a) for the simultaneous possession with intent to distribute different kinds of drugs because the possession of each different kind of drug constituted a distinct offense. *See* Opening Brief at 27 (citing cases). The government asserts that these double jeopardy cases are irrelevant because a Section 846 case normally charges a single conspiracy to commit *numerous* distinct

substantive offenses. Brief of the United States at 34-35. The government's response to this point is wholly unpersuasive.

The government's construction in response to the double jeopardy problem actually supports Petitioners' position. Petitioners maintain that the conspiracy charge in this case does allege a conspiracy to commit one or more of two distinct offenses, each offense being defined by the identity of the drug in question. It is precisely this fact that makes the jury's general verdict ambiguous. The government's fundamental argument is that the Section 846 count charges a conspiracy to commit a *single* crime – namely, a violation of Section 841(a) in general, in which the Section 841 object does not involve or require *any* specification of the drugs. *See* Brief of the United States at 22-25. This essential premise of the government's argument, that a Section 841 violation requires no identification of the drug at issue, clearly contradicts the position it has advanced in double jeopardy cases – that the type of drug is an element of the offense for which there can be multiple punishment.

4. The government's position is inconsistent with this Court's decision in *Griffin v. United States*, 502 U.S. 46 (1991). As Petitioners explained in their Opening Brief, the *Griffin* decision, and the line of cases *Griffin* addresses, simply make no sense on the government's construction of Section 846. *See* Opening Brief at 36-38. In effect, the government argues here that a conspiracy case – and there is no basis to distinguish Section 371 from Section 846 in this regard – simply charges a single crime that may be committed in multiple possible ways; the jury's sole function is to render a verdict on the single crime of conspiracy; and, where the government charges multiple objects, the jury need not agree on the objects it finds. If this were correct, the *Griffin* decision would make no sense, for the Court could simply have said, as the government says here, that the determination of which particular possible objects the defendants agreed to commit is just a sentencing function for the trial court. The government chose not to address this point in its brief. *See* Brief of the United States at 35-36.

5. In the Opening Brief, Petitioners argued that the lower court's opinion sanctions a form of indictment that provides insufficient notice of the maximum statutory penalty in violation of due process. In its brief, the government argues that the specifics in Petitioners' indictment "sufficiently identified the offense at issue to allow them to plead the indictment in bar in any subsequent prosecution for the same offense." In support, the government cites a line of cases that holds that indictments must apprise defendants of the nature of the accusations against them, sufficient for a double jeopardy review. Brief of the United States at 29. However, the government ignores the distinct line of due process cases cited by Petitioners that concern a defendant's right to notice of the severity of the potential punishment.¹⁰ See Opening Brief at 39-40. It is this line of cases that is relevant to the issue before the Court.

Second, the government asserts that the notice issue is irrelevant to this case because the indictment "*did* identify the particular controlled substances that petitioners were charged with conspiring to possess and distribute." Brief of the United States at 28. True, Count One of the indictment did name two drugs, powder cocaine and cocaine base. However, as Petitioners argued in the Opening Brief and elsewhere in this Reply, the trial court's instructions permitted the jury to convict if they found either a cocaine base or powder cocaine conspiracy (or both). Therefore, as the case was actually submitted to the jury, the indictment ultimately failed to accurately notify Petitioners of the true statutory maximums they would face at the conclusion of the trial.

¹⁰ Elsewhere, the government has conceded that due process entitles a defendant to notice of the statutory maximum punishment. See *United States v. Carrozza*, 4 F.3d 70, 81 (1st Cir. 1993), *cert. denied* 511 U.S. 1069 (1994) ("We agree with the government that the statutory maximum sentence must be determined by the conduct alleged within the four corners of the indictment. Otherwise, a defendant would not know at the time of his arraignment or change of plea what his maximum sentence would be on the charged offenses.") (emphasis added).

The government further raises the specter that what Petitioners truly seek is "notice of the specific quantities of drugs" in the case that would require "pretrial access . . . evidence the government actually possesses . . .". Brief of the United States at 29. These responses misunderstand both Petitioners' argument and the scope of the remedy it requires. Petitioners recognize that the clear import of this notice argument is that, in a conspiracy charging a Section 841 offense, the indictment should in some manner reflect the relevant penalty provision of Section 841(b) the government intends to prove at trial was the object of the conspiracy, and thereby establish the statutory sentencing maximum. Nevertheless, while it is not necessary for the Court to reach this issue for Petitioners to obtain relief, it is important to note that satisfying due process would not require the parade of pretrial discovery requests the government fears. Rather, consistent with the actual indictment practices in many districts, the government simply has to add the relevant subsection of Section 841(b) to a conspiracy count.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court remand this case for resentencing or a new trial.

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